

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION**

CARLOS COLLINS,

Plaintiff,

v.

Case No. 14-14105

DANIEL H. HEYNS, et al.,

Defendants.

ORDER OF DISMISSAL WITHOUT PREJUDICE

On December 9, 2015, the court ordered Plaintiff to show cause why it should not dismiss Plaintiff's case for failure to prosecute. (Dkt. # 30.) Plaintiff was ordered to respond by December 23, 2015, but filed an untimely response on December 29, 2015. (Dkt. # 31.) The court finds that Plaintiff has not adequately responded to the court's order, and it will therefore dismiss the case.

Plaintiff commenced this action and paid the filing fee on October 23, 2014, seeking damages and injunctive relief for an allegedly painful, grapefruit-sized hernia on which prison medical staff refuse to operate. Because he had paid the filing fee, Plaintiff was not proceeding *in forma pauperis*, but the Clerk's office mistakenly issued summons with a cover sheet indicating that Plaintiff was proceeding as such. (Dkt. # 4.) Shortly thereafter, Defendant Daniel Heyns waived service, while Defendant Rhodes provided no waiver. On December 23, 2014, Plaintiff moved to have the United States Marshals Service serve Defendant Rhodes. The Clerk's office recognized and corrected its mistake regarding Plaintiff's erroneous *in forma pauperis* status on May 12, 2015,

filing a Notice of Correction which was served on Plaintiff. (Dkt. # 22.) Accordingly, Magistrate Judge Michael J. Hluchaniuk denied Plaintiff's motion to have a deputy Marshal serve Defendant Rhodes, clarifying that Plaintiff was not proceeding *in forma pauperis* and was not entitled to have the Marshals Service serve Defendant on his behalf. (Dkt. # 25.)¹ Thus, Plaintiff was on notice that he was not relieved of the burden to serve process on Defendant Rhodes.

After receiving notice of the service requirement, Plaintiff filed a motion seeking an additional 120 days to serve Defendant Rhodes. (Dkt. # 26.) Magistrate Judge Hluchaniuk granted the motion, and summons for Defendant Rhodes was reissued. (Dkt. 27.) Plaintiff's extended time to serve process lapsed in November 2015 and Plaintiff did not move for any additional time.

On December 9, 2015 the court issued an order to show cause why the case should not be dismissed for failure to prosecute. (Dkt. # 30.) Plaintiff submitted an untimely response, alleging that the pain due to his hernia caused the "failure to respond and/or prosecute the cause action [sic]." The response does not specifically address Plaintiff's failure to serve Defendant Rhodes, nor does it request more time to do so.

Federal Rule of Civil Procedure 4(m) provides that if service is not effectuated within 120 days, the court shall dismiss the action without prejudice as to that defendant. However, if plaintiff shows good cause for his failure to serve that defendant, the court shall extend the time for service for an appropriate period. Fed. R. Civ. P.

¹ The case was referred to Magistrate Judge Hluchaniuk for management of all pretrial matters. (Dkt. # 5.)

4(m). Eastern District of Michigan Local Rule 41.2 likewise provides that if the parties have not taken action within a reasonable time, the court may enter an order dismissing the case for lack of prosecution.

Plaintiff has already received one extension of time and has, in other instances, been able to file motions and other papers with the court despite his pain. He has offered the court no reason to believe that he has been diligent in his efforts to effectuate service, indeed he has not described any such efforts at all. Plaintiff was informed by Magistrate Judge Hluchaniuk's Order that the burden to serve process was on him, and he has not carried that burden. Accordingly,

IT IS ORDERED that this action is DISMISSED WITHOUT PREJUDICE as to Defendant Dr. Rhodes for lack of service and failure to prosecute pursuant to Federal Rule of Civil Procedure 4(m) and Eastern District of Michigan Local Rule 41.2. A separate judgment will issue.

S/Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: April 15, 2016

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, April 15, 2016, by electronic and/or ordinary mail.

S/Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522